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No. 92-008

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

BODINE'S, INC.,

Petitioner,

v.

PAT GORDON, CATHERINE THOMAS, SAM GORDON, MICHELLE CHROMAN, ADAM CHROMAN; MELISSA CHROMAN; EDWARD BODEN, SR. and EDWARD BODEN, JR.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents are dissatisfied with the statement of the questions presented by Petitioners.

1. The first question listed by Petitioners should be rephrased: "Whether a state court may, consistent with the due process clause of the Fourteenth Amendment, determine that fluid recovery is a permissible remedy under state law?"

2. The second question listed by Petitioners should be rephrased: "May an Illinois court, consistent with the due process of the Fourteenth Amendment, apply the law of Illinois to the claims of residents of other states against a business which (a) was located in Illinois, (b) devised within the state of Illinois a scheme to manufacture and sell adulterated 'orange juice,' (c) manufactured within the state of Illinois large quantities of a liquid purporting to be '100% pure orange juice,' but which consisted largely of adulterants, and (d) distributed the liquid to numerous purchasers, some within the state of Illinois and some residing elsewhere."

3. The third question listed by Petitioners is not involved in this case.

4. The fourth question listed by Petitioners has not been addressed by the Illinois Appellate Court, which discussed "fluid recovery" in the context of the Illinois Consumer Fraud Act.

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ON PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

BRIEF IN OPPOSITION

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents Pat Gordon, Catherine Thomas, Sam Gordon, Michelle Chroman, Adam Chroman, and Melissa Chroman pray that the Court decline to issue a writ of certiorari in this case.

STATEMENT OF THE CASE

The Petition substantially misstates the nature of the case and omits material facts.

First, the Petition leads the Court to believe that the supermarket defendants are still parties to this case. The supermarkets were in fact dismissed with prejudice by the trial court.

Second, the Petition fails to disclose the precise nature of the conduct that gives rise to this action, or that respondents Edward Boden, Sr. and Edward Boden Jr. have plead guilty to criminal charges arising out of the adulteration.

The Third Amended Complaint (A20) alleges that this action arises from a massive criminal scheme to adulterate orange juice products (orange juice, orange juice from concentrate and frozen orange juice concentrate) manufactured by defendant Bodine's, Inc. ("Bodine's"). In 1978, Bodine's was a small producer of orange juice concentrate. By 1985, Bodine's had become the largest processor of frozen orange juice concentrate in the Midwest. The reason for the remarkable growth is that Bodine's sold what was represented to be 100% pure orange juice products, but was in fact adulterated.

The products were prominently labelled as 100% pure orange juice. In fact, the orange juice products were intentionally adulterated with up to 40% beet sugar, corn sugar, monosodium glutamate, and other low-cost, inferior ingredients.

The scope of the fraud is indicated by the fact that the criminal indictment alleged, as overt acts, the purchase of *tens of thousands of tons* of adulterants. For example, between July 1982 and July 1983, Bodine's purchased over 188,000 gallons of evaporator waste water for

inclusion in "orange juice products." Between 1983 and 1985, Bodine's purchased approximately 37.5 million pounds of beet sugar from one source for inclusion in "orange juice products." Between January 1985 and March 1985, Bodine's purchased another 937,000 pounds of beet sugar from another source for inclusion in "orange juice products." A third source furnished 1.6 million pounds of beet sugar during the first six months of 1985, and a fourth 4.2 million pounds during the same period.

Between 1978 and 1985, Bodine's sales increased from approximately $3 million per annum to approximately $100 million per annum. Bodine's achieved this remarkable increase in sales by selling its product significantly more cheaply than other major producers of orange juice products. Bodine's was able to do this in large part by adulterating its products.

The substitution of the inferior ingredients was concealed from the public. Concealment was essential to the successful sale of the adulterated products as 100% orange juice products because even if there was someone who would be willing to consume the adulterants, they would not have purchased 100% orange juice products and would not have paid the price of 100% orange juice products. The average member of the public did not, and could not reasonably have been expected to, learn of this scheme until the return of the 19-count indictment by the federal grand jury, in July 1989. This action was filed soon after the indictment was announced.

At all times when the adulterated products were sold, there were artificial orange drink products on the market available to anyone who cared to purchase orange-flavored drinks that were not 100% pure orange juice. These

artificial orange drink products were much cheaper than pure orange juice products.

The defendants remaining in the case are Bodine's and its former principals – the individuals directly responsible for the fraud. The individuals have pleaded guilty to part of the indictment, pursuant to a plea bargain agreement. Edward Boden Sr. received two years in prison, 1,000 hours of community service, and a $250,000 fine. Edward Boden Jr. received two years probation, a $200,000 fine, and 200 hours of community service. Roger Walsh Jr. received two years probation and 200 hours of community service. Neither they nor their company have been required to disgorge the unlawful revenues they derived from selling adulterated "orange juice."

Third, the Petition makes factual representations that are not supported by anything in the record. In particular, the Petition makes unsupported factual representations that the present owners of Bodine's "had no knowledge of" the adulteration and "cooperated fully with federal authorities' investigation of the former owners." (Petition, p. 3 n.2) These are matters to be explored during discovery.

Fourth, the Petition represents that "the nationwide class is, and likely will remain, utterly unidentifiable." (Petition, p. 3) In fact, several of the named plaintiffs retained labels or other proofs of purchase from the "orange juice."

The trial court found in its order certifying a class that *many* of the class members would not be able to prove their precise purchases through documentary evidence. Some of the class members, including several of the named plaintiffs, do have proofs of purchase of the products in question, such as labels, coupons, Uniform Product Codes (the bar code found on most grocery

packaging). (Bodine's conducted promotions requiring submission of labels or Uniform Product Codes from time to time, and some people kept theirs.) However, it is likely that most of the class members will not be able to document all of their purchases.

Fifth, the Petition represents that "fluid recovery will dispense with giving notice of the pending action to plaintiff class members until after liability is determined" (Petition, p. 3). We are totally unable to discern the basis for this representation. Neither the trial court nor the appellate court addressed the issue of whether notice should be given, or in what form.

STATUTORY PROVISIONS

The Petition does not refer to any pertinent statutory provisions.

Respondents believe that the Illinois Consumer Fraud Act is material.

Illinois Consumer Fraud and Deceptive Business Practices Act, §2, *Ill. Rev. Stats.*, ch. 121-1/2, ¶262:

> [U]nfair or deceptive acts or practices, including but not limited to the use of employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act", approved August 5, 1965 [*Ill. Rev. Stats.*., ch. 121-1/2, ¶312], in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact

> been misled, deceived or damages thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act [15 U.S.C. §45].

Illinois Consumer Fraud and Deceptive Business Practices Act, §10a, *Ill. Rev. Stats.*, ch. 121-1/2, ¶270a:

> (a) Any person who suffers damage as a result of a violation of this Act committed by any other person may bring an action against such person. The court, in its discretion may award actual damages or any other relief which the court deems proper. Proof of a public injury, a pattern, or an effect on consumers generally shall not be required.

SUMMARY OF ARGUMENT

The only issue presented is whether Illinois courts, in enforcing the Illinois Consumer Fraud and Deceptive Business Practices Act, can enter a judgment against a perpetrator of consumer fraud who operates within Illinois in the amount of the ill-gotten gains secured through the fraud, and then distribute the ill-gotten gains to consumers. No issues are presented under RICO or any other federal statute.

Illinois' adoption of this "fluid recovery" procedure to insure the disgorgement of ill-gotten gains by perpetrators of consumer fraud raises no significant federal constitutional question. It does not violate Petitioners' substantive due process rights because preventing consumer fraud is a permissible state objective and depriving perpetrators of consumer fraud of the money they obtain through such conduct is a rational means of achieving that objective. It does not violate Petitioners' procedural

due process rights because fair and accurate legal procedures are used to determine the amount of the ill-gotten gains.

Petitioners' argument that they cannot be deprived of their ill-gotten gains unless the individuals from whom the money was taken has no merit. The constitutionality of the many state and federal statutes that provide for the forfeiture of the proceeds of illegal activity is clear. The fact that an aggrieved consumer is allowed to bring the suit likewise raises no constitutional issues – this Court has upheld "informer statutes" which permit anyone to bring such an action.

The rights of the consumers from whom the money was illegally taken are also not violated. As long as the consumers are given the best notice practicable under the circumstances and an adequate opportunity to make claims, their rights are fully protected. Nothing in the record even remotely suggests that the consumers' rights will be disregarded. Furthermore, Petitioners do not have standing to invoke the rights of the consumers whom they have defrauded.

Petitioners' argument that due process precludes Illinois from distributing their ill-gotten gains to consumers who do not reside within Illinois has no basis. Petitioners were located in Illinois and committed all of the illegal activity in Illinois. Illinois has a legitimate interest in preventing the commission of fraudulent acts within its territorial jurisdiction, and insuring that such acts are not profitable. It may apply its law irrespective of where the consumers were located.

Petitioners' argument that depriving them of ill-gotten gains in a civil action is unconstitutional is frivolous. The use of civil proceedings to force lawbreakers to account for ill-gotten gains is commonplace and constitutional.

ARGUMENT

I.

ILLINOIS' ADOPTION OF "FLUID RECOVERY" TO INSURE THE DISGORGEMENT OF ILL-GOTTEN GAINS RAISES NO SIGNIFICANT FEDERAL CONSTITUTIONAL QUESTION.

Petitioners substantially misstate the decision of the Illinois Appellate Court. When properly analyzed, it is clear that the decision of the Illinois courts to force the disgorgement of ill-gotten gains derived from consumer protection violations through the mechanism of "fluid recovery" is well within the competence of a State to provide appropriate remedies for fraudulent behavior.

At the outset, it is important to note that, contrary to Petitioners' argument, the Illinois Appellate Court did not decide that "fluid recovery" is appropriate under RICO or any other federal statute. The Appellate Court's opinion was based on the Illinois Consumer Fraud and Deceptive Business Practices Act. As Petitioners concede in a footnote (p. 20, n.5), the Appellate Court held that "fluid recovery is available in at least the claim brought under the Consumer Fraud Act." It said nothing about the other claims.

It is quite possible that the question of whether fluid recovery is available under other state or federal claims will be of no significance in the litigation. For example, if a judgment should be entered in favor of the class under the Consumer Fraud Act claim that is as large as could be recovered under any other claim, or which exceeds the Petitioners' assets, the question of whether fluid recovery is permissible under any other theory will not affect anyone's rights. Both for this reason, and because there has been no decision of any Illinois court of review on the availability of fluid recovery under any

other claim, the Court should limit consideration of the Petition for Certiorari to the question actually addressed below – whether the use of fluid recovery under the Illinois Consumer Fraud Act is unconstitutional.

When considered in this context, it is clear that the use of 'fluid recovery' raises no significant federal question. "Fluid recovery" refers to the fact that it is much easier to determine the financial impact of mass wrongs, such as those involved in this case, on an aggregate basis than on an individual basis. That is, while it may be difficult to document how much bogus "orange juice" particular class members purchased, it is not difficult to document how much adulterated orange juice was produced or how much money the defendants made through this misconduct.

As specifically set forth in the indictment, and as was repeated in the complaint, evidence exists showing how many tons or thousands of gallons of evaporator waste water, beet sugar, and other adulterants defendants purchased during specific periods of time. Production records show how much orange juice was produced during the same periods of time. Former employees will testify that the adulterants went into the orange juice. Thus, by comparing the proofs relating to the acquisition of adulterants to the production records, it is relatively simple to determine the average extent of adulteration during specified periods. Sales records, showing how much defendants received for the concoction sold as "orange juice," also exist; hence, it is possible to determine how much defendants made through their illegal activities, or how much they saved by comparing the cost of the adulterated materials to the cost of the ingredients of orange juice.

"Fluid recovery" addresses the difficulty in determining which class members are entitled to receive the damages computed in the foregoing manner. Once the gross damages are computed, class members can file proofs of claim setting forth their purchases of the affected orange juice products and providing any documentation of the purchases that was retained (such as several of the named plaintiffs kept). If the claims do not exhaust the total recovery, the balance can be placed in a fund for the purpose of reducing prices on the affected orange juice products.

"Fluid recovery" is a mechanism for preventing wrongdoers from profiting from the fact that their victims are numerous. It involves the assessment of damages suffered by the class as a whole followed by its distribution in the manner most likely to result in benefit to the injured population. The trial court in this case described "fluid recovery" as "various mechanisms involving the assessment of damages to the class as a whole followed by its distribution in the manner most likely to result in benefit to the injured population." Similarly, in *Simer v. Rios*, 661 F.2d 655, 675 (7th Cir. 1981), the Court of Appeals described fluid recovery as one in which "the money is either distributed through a market system in the way of reduced charges or is used to fund a project which will likely benefit the members of the class."

The Illinois courts in effect determined that the "any other relief which the court deems proper" referred to in §10a of the Illinois Consumer Fraud Act includes an order requiring disgorgement of the ill-gotten gains from a consumer protection violation through the mechanism of "fluid recovery." As so construed, §10a is perfectly consistent with due process.

There is no due process objection to a statute which (expressly or by construction) empowers the courts of a state, upon proof that a defendant profited from illegal behavior, to determine the amount of the ill-gotten gains and enter judgment against the defendant in that amount. *Substantive* due process is satisfied as long as the statutory remedy is a rational means to accomplish a proper purpose. Preventing fraud is a proper purpose, and requiring a wrongdoer to turn over the profits from fraud is a rational means of accomplishing it.

Petitioners' *procedural* due process rights are satisfied if the procedures used to determine the amount of the ill-gotten gains are fair. Here, the same legal procedures that Illinois uses to adjudicate civil actions generally will be employed. Respondents will have to prove, by a preponderance of competent evidence, the amount of Petitioners' ill-gotten gains. Petitioners will be entitled to conduct discovery, cross-examine, present evidence, and otherwise defend themselves. There is nothing in the record that even suggests that any unfair procedures will be used.

Petitioners argue that a state cannot force them to disgorge their ill-gotten gains unless the individuals from whom the gains were obtained can be precisely identified. Petitioners also seem to find some constitutional infirmity in allowing suit to be brought by a consumer. There is no basis for their arguments.

Assume that the state of Illinois provided that instead of distributing the ill-gotten gains to consumers, the money should be placed in the state treasury. There are in fact numerous state and federal statutes which authorize forfeiture to the state of the profits of illegal activity. Comprehensive Drug Abuse Prevention and Control Act

of 1970, 21 U.S.C. §§484, 853, 881 *et seq.*; Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1963; Bank Secrecy Act, 31 U.S.C. §5317; Illinois Controlled Substances Act, *Ill.Rev.Stats.*, ch. 56-1/2, ¶1505; Wisc. Stats., §§973.075 *et seq.* These statutes are not *per se* unconstitutional. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 236-37 (1972).

The identity of the persons authorized to bring suit raises no constitutional questions. At one time in our history, it was common to allow any person to bring suit as an "informer" to recover the proceeds of certain types of illegal activity. The False Claims Act, 31 U.S.C. §3729 *et seq.*, still provides for such a remedy in the case of frauds injuring the United States. This Court has rejected constitutional attacks on the False Claims Act. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *United States ex rel. Ostrager v. New Orleans Chapter, Associated General Contractors of America*, 317 U.S. 562 (1943). If it is constitutional to permit any person with private knowledge of the matter to bring suit to compel the disgorgement of money obtained through fraud from the United States, it is difficult to see why it is unconstitutional for Illinois to permit any person damaged by a consumer protection violation to bring suit to compel the disgorgement of money obtained as a result of such a violation.

The situation is no different than when the police arrest a burglar and recover a large quantity of stolen property. The authorities attempt to return such of the property as can be identified to the rightful owner. Property which can be determined to be stolen, but whose owners cannot be identified, is either used for governmental purposes or sold and the proceeds so used. This is consistent with the laws in every state on

the subject of escheat (the constitutionality of which is unquestionable). Due process does not require that stolen property be returned to the thief, or that multiple hearings be held to determine if the property is in fact stolen when a single, overall hearing can determine this matter adequately because it is patently obvious that the burglar did not legitimately acquire 120 VCRs and stereos with the serial numbers filed off. Indeed, given the nature of the proof and the reasonable inferences to be drawn, a finding that all 120 items were stolen could be supported without calling any putative owners.

The present situation is no different. Petitioners have a due process right to an accurate determination of their guilt and an accurate determination of the amount of their ill-gotten gains. They do not have a right to keep their ill-gotten gains as a reward for devising a mechanism for defrauding the public that makes it difficult to return them to the injured individuals. Whether the ill-gotten gains are escheated or forfeited to the state, or distributed through a fluid recovery mechanism, is not something about which the Petitioners have any right be concerned about.

The class members who purchased the adulterated "orange juice" have due process rights with respect to the distribution of the proceeds. However, "fluid recovery" is perfectly consistent with those rights. (In addition, Petitioners would not have standing to complain that the rights of their victims are being infringed.) As long as the best notice practicable under the circumstances is given to the class members who might be entitled to file claims, and the class members are given a fair opportunity to claim their share of the ill-gotten gains, the class members' due process rights are satisfied.

In *Bruno v. Superior Court*, 127 Cal.App.3d 120, 179 Cal.Rptr. 342 (1981), the California courts considered and rejected the "due process" arguments advanced by Petitioners. The wrong in *Bruno* was quite similar to that in this case – artificially inflating the price of milk in violation of the state antitrust laws. The complaint requested that the aggregate overcharge be calculated from defendants' records, that individual purchasers be permitted to present claims, and that to the extent the damages collected were not exhausted by the claims presented, that the balance be used to subsidize a lowering of milk prices in the area affected by the violation. The appellate court reversed the lower court's order striking this prayer for relief on the ground that "fluid recovery" was unconstitutional or legally impermissible:

> While compensation of injured persons is a primary goal, class actions also serve the important purpose, when individual lawsuits are not feasible, of removing ill-gotten gains from the hands of those engaged in unlawful practices. [citations] Absent the use of fluid class recovery, some class actions, those were proof of individual claims is impractical, would neither compensate nor deter, for to allow the defendant to insist upon proof of individual claims will enable it to benefit from the cumbersome nature of legal proceedings and the lack of sophistication and indolence of the consumer, and will reward his foresight in stealing from the multitude in small amounts. (179 Cal.Rptr. at 345-46)

Turning to the same constitutional arguments made by Petitioners, the court held:

> A class action which affords due process of law to the defendant through the time when the amount of his liability is calculated cannot suddenly deprive him of his constitutional rights because of the way

> the damages are distributed. Where damages have been fairly and legally removed from his possession, a defendant's due process rights have been fully vindicated. [citation] Only the class members will have due process rights jeopardized when damages are distributed by fluid class recovery, but those rights can be protected by notice and claim procedures that give class members an adequate opportunity to obtain their individual shares before the residue is distributed through a fluid recovery procedure. (179 Cal.Rptr. at 346-47)

Moreover, if one starts with the premise that in the absence of "fluid recovery" the aggrieved individuals will have *no* recovery, as opposed to the premise that each aggrieved individual has a very theoretical right to full damages, the aggrieved individuals are not deprived of anything. *Bruno v. Superior Court, supra,* 179 Cal.Rptr. at 349. Thus, "the substantive rights of class members are not altered by the fluid recovery. By responding to notice and submitting a claim, each member may receive his [applicable] damages just as if he had brought an individual action." Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin,* 87 Harv.L.Rev. 426, 449 (1973).

Other courts have also found that "fluid recovery" is constitutionally unobjectionable. *Simer v. Rios,* 661 F.2d 665, 675 (7th Cir. 1981); *Hogya v. Superior Court,* 75 Cal.App.3d 122, 142 Cal.Rptr. 325 (1977) (fluid recovery authorized where defendant sold misgraded meat to the public); *West Virginia v. Chas. Pfizer & Co.,* 314 F.Supp. 710 (S.D.N.Y. 1970), *aff'd,* 440 F.2d 1079 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971);[1] *Bebchick*

[1]This was the antibiotics antitrust case. The defendants made a universal settlement of their libaility for antitrust violations

[footnote continued]

v. Public Utilities Commission, 318 F.2d 187 (D.C. Cir. 1963); *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252, 1254 (7th Cir. 1984); *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 63 Cal.Rptr. 724, 433 P.2d 732, 746 (1967);[2] *Cicelski v. Sears, Roebuck & Co.*, 132 Mich.App. 298, 348 N.W.2d 685 (1984).

Petitioners cite early cases disapproving of "fluid recovery" under Rule 23 of the Federal Rules of Civil Procedure. Most of these cases did not state any reasons for doing so. For example, in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973), merely stated in conclusory terms that "fluid recovery" violated due process; there was a strong dissent. Similarly, *Windham v. American Brands, Inc.*, 565 F.2d 59, 72 (4th Cir. 1977), another divided decision, merely parrots *Eisen*'s conclusion that "fluid recovery" was "illegal, inadmissible as a solution of the manageability problems of class actions

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over a period of ten years by depositing $120 million, to which various groups of claimants within the chain of distribution claimed entitlement. A group of pharmacists objected to any distribution to consumers on the ground, *inter alia*, that the consumers could not prove their purchases. The court denied the objection, allowed consumers to simply file unsupported proofs of claim, and ordered that any funds not claimed in this manner be paid to the states in which the consumers resided. While *Antibiotics* did involve a settlement, a group of wholesale and retail pharmacists objected to any payment to the consumers. Furthermore, the objections to fluid recovery – such as that it deprives the class members of due process of law – would compel its rejection even in the context of a settlement.

[2]See the discussion of the later history of the *Daar* case in Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 Mich. L. Rev. 338, 366 n. 186 (1971). The litigation was ultimately terminated by a settlement in which the proceeds were used to create a fund to benefit the injured population (taxi riders) through fare reductions.

and wholly improper." In neither case was any explanation furnished.

Those courts which have carefully analyzed the propriety of "fluid recovery" – the Seventh Circuit, at least one other federal court of appeal, and the California courts – have expressly sanctioned it. A number of commentators also find no merit to the "constitutional" objections to "fluid recovery." For example, *Developments in the Law – Class Actions*, 89 Harv.L.Rev. 1318, 1524-25 (1976), states:

> The nature of the due process argument is not clear. Because of the constraints of substantive law, class-wide calculation of damages would be inappropriate where the class opponent has defenses that he could assert against class members on an individual basis. In the absence of such necessarily individualized inquiries, however, the class opponent hardly seems prejudiced by being restricted to only one hearing on common issues. Even though the calculations of damages might involve issues on which a hearing would ordinarily be required by due process, it has never been thought that due process required multiple hearings where there was one full and fair adjudication of the merits.

Similarly, another commentator wrote:

> It is difficult to see how the use of this residue [of unclaimed damages] to lower the future [prices of the commodity or service that was the subject of the overcharge] either modifies defendant[s'] rights or enlarges the rights of the class members. If the defendants' liability has been established, and assuming that res judicata will bar duplicative recovery, total damages under the fluid recovery will be identical to what they would be were each injured class member to come forth and prove his damages.

The defendants' rights will thus not be adversely affected.

Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin, supra,* 87 Harv.L.Rev. 426, 449 (1973). *See also, Cicelski v. Sears, Roebuck & Co., supra,* 348 N.W.2d at 690 ("*Eisen* does not convince us of the existence of an inherent constitutional defect in the fluid recovery format").

In short, the due process clause no more prohibits the use of "fluid recovery" to dispose of unclaimed ill-gotten gains than it prohibits the escheat of forgotten bank balances, undistributable inheritances, or unreturnable stolen property.

II.

NOTHING IN THE APPELLATE COURT'S OPINION SUGGESTS THAT THE BEST NOTICE PRACTICABLE WILL NOT BE GIVEN TO THE CLASS.

Petitioners next contend that Illinois cannot apply its proposition that class members will be deprived of notice. There is no basis for the assumption. Petitioners cite nothing in the record authorizing notice to be dispensed with. Indeed, all they state (p. 9) is that "The Illinois Appellate Court approved the use of fluid recovery to assess damages to the class as a whole, without making any provision for adequate notice to all class members prior to an adjudication on the merits."

The Illinois class action statute authorizes the trial court to "order such notice that it deems necessary to protect the interests of the class and the parties." *Ill.Rev.Stats.*, ch. 110, ¶2-803. The Supreme Court of the state has construed ¶2-803 to be mandatory in any case

where due process requires notice. *Teachers Ins. & Ann. Ass'n v. Frank*, 71 Ill.2d 583, 376 N.E.2d 1377 (1978).

Nothing in this record shows that ¶2-803 or the requirements of due process will not be complied with. The matter was simply not yet addressed by either the trial court or the Appellate Court. Petitioners in effect ask this Court to issue an advisory opinion as to what is required, without giving the trial and appellate courts of Illinois a chance to address the matter. Their request shows disrespect for the competence of the state courts.

III.
ILLINOIS CAN CONSTITUTIONALLY APPLY ITS CONSUMER FRAUD ACT TO PETITIONERS' CONDUCT.

Petitioners next contend that Illinois cannot apply its Consumer Fraud Act to the claims of persons who do not reside in Illinois. There is no basis for the argument.

Illinois can apply its law to the entire controversy if Illinois has "a significant contact or a significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981); *Phillips Petroleum Co v. Shutts*, 472 U.S. 797, 811-12 (1985).

The Illinois Supreme Court has held that the Illinois Consumer Fraud and Deceptive Business Practices Act applies to a scheme by an Illinois business to engage in conduct within the territorial jurisdiction of Illinois that defrauds consumers located in other states. In *Martin v. Heinold Commodities*, 117 Ill.2d 772, 510 N.E.2d 840 (1987), a class action was brought against an Illinois business by an Oklahoma resident, suing on behalf of a nationwide class and alleging breach of fiduciary duty

and violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. (510 N.E.2d at 841) The complaint alleged that the defendant engaged in unfair and deceptive practices in connection with futures transactions. The Court held that Illinois law could be applied to all members of the class because Illinois had a substantial interest in seeing that companies headquartered in the state behaved themselves properly:

> [W]e conclude that the substantive law of Illinois can be applied to resolve the factual issue common to the class.
>
> The Supreme Court recently addressed the question of which State's substantive law governs resolution of common factual issues presented in a multistate class-action litigation. The court held that the substantive law of the forum State could be applied, consistent with the requirements of procedural due process, where the forum State has "significant contact or aggregation of contacts to the claims asserted by each member of the plaintiff class, contacts creating state interests . . . ensuring that the choice of its law is not arbitrary or unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985). . . .
>
> Applying the *Phillips Petroleum* standard to the instant case, it is apparent that Illinois substantive law can be applied to resolve the underlying common factual dispute. Here each member of the plaintiff class asserts the same breach of defendant's fiduciary duty with regard to the same nondisclosure of the same fact. This common allegation implicates the legitimate interests of the State of Illinois in insuring that persons and entities within its jurisdiction, insofar as they undertake to acts as agents, do so in accordance with its law. In this connection, we observe that defendant's principal place of business is Illinois and that this fact was

> made manifest to each member of the plaintiff class in the following ways: . . . . On these facts, there can be no doubt that the claim of each member of the plaintiff class implicates the legitimate interests of Illinois in applying its law to adjudicate a dispute involving a business principally situated in its jurisdiction and which, by its own efforts, has insistently has sought to avail itself of both the courts and the laws of the forum State. (510 N.E.2d at 847)

The decision of the Appellate Court in this case is but one of numerous decisions applying the consumer protection law of State A to consumer frauds that injure persons in other states. *Fry v. UAL Corp.*, 136 F.R.D. 626, 637 (N.D.Ill. 1991) (court applied Illinois Consumer Fraud Act to conduct by Illinois business directed against persons in other states); *Cange v. Stotler & Co.*, 913 F.2d 1204, 1210 (7th Cir. 1990) (transaction between Chicago futures broker and out-of-state investor within the territorial scope of Consumer Fraud Act); *Brown v. Market Development, Inc.*, 41 Ohio Misc. 57, 322 N.E.2d 367, 369 (1974) (Ohio consumer protection statute "is intended to prohibit (and to provide civil remedies to enforce the prohibition of) deceptive and unconscionable acts and practices by Ohio suppliers in connection with consumer transactions, irrespective of the location of the consumer, whether within or without Ohio"); *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 667 P.2d 1304 (1983) (state could bring action under the Arizona consumer protection, securities and racketeering laws against persons who set up shop in that state and swindled nonresidents because the state has both a legitimate interest and "a moral imperative" to act under such circumstances); *Kugler v. Haitian Tours, Inc.*, 120 N.J.Super.

260, 293 A.2d 706 (1972) (New Jersey consumer protection statute "prohibits unlawful practices in New Jersey without limitation as to the place of residence of the persons imposed upon"); *In re DeFelice*, 77 B.R. 376 (Bkcy., D.Conn 1987) ("New York's quasi-sovereign interest is served whenever the perpetrators of consumer fraud within its borders are brought to justice regardless of whether their victims happen to be citizens"); *People v. Camera Warehouse, Inc.*, 301 Misc.2d 498, 496 N.Y.S.-2d 659, 660 (1985) ("a state is damaged if its citizens are permitted to engage in fraudulent practices even though those parties damaged are nonresidents of the State").

In the closely analogous context of state "Blue Sky" laws, courts hold that a defrauded securities purchaser has remedies under both the law of the state where defendant engaged in the fraudulent conduct and the law of the state where the purchaser received the fraudulent security. *Barnebey v. E.F. Hutton & Co.*, 715 F.Supp. 1512, 1533-36 (M.D.Fla. 1989); *Rio Grande Oil Co. v. State*, 539 S.W.2d 917 (Tex.Civ.App. 1976) (affirming seizure of assets of purveyors of fraudulent securities who operated out of Texas, but swindled only persons in other states); *Simms Investment Co. v. E.F. Hutton & Co.*, 699 F.Supp. 543, 545-46 (M.D.N.C. 1988); *Lintz v. Carey Manor Ltd.*, 613 F.Supp. 543, 551 (W.D.Va. 1985) ("It cannot be disputed that Virginia has a legitimate interest in applying its securities laws to operations conducted within the state, even if aimed at non-residents. [citations] And if the General Assembly chooses to regulate these transactions through the imposition of statutory civil liability in addition to criminal liability, it is free to do so); *Johnson-Bowles Co. v. Division of Securities*, 1991 Utah App. LEXIS 181, at 24-26 (Feb. 19, 1992). In *Barnebey*, the court explained:

> [T]he securities laws of two or more states may be applicable to a single transaction without presenting a conflict of laws question . . . .[O]verlapping state securities laws do not present a classic conflict of laws question . . . .
>
> . . . Many if not all such laws are written to protect purchasers of securities, regardless of the security's origin. Such statutes also seek to render liability on securities issuers whose activities within a given state fail to conform to that state's laws. . . . When a securities transaction crosses state lines and the plaintiffs sue under a blue sky law (as in this case), more than one state's blue sky law may apply. In such situation, the issue is not (as defendants would urge) "of the states whose law might apply, which state law will a conflicts analysis indicate is the 'better' choice of law." Rather, the issue is whether the plaintiffs' allegations show a sufficient nexus between the parties and the particular state law pleaded to justify applying that law. . . . (715 F.Supp. at 1535-36)

A multistate consumer fraud case is really no different, insofar as constitutional limitations on choice of law are concerned, from the classic law school case of a defendant who, while standing in state A, fires a rifle across the state line, killing someone in state B. The malefactor has violated the murder statutes of both states and can constitutionally be prosecuted by either. Clearly, the state from which the gun is fired has a "legitimate interest" in preventing people within its territorial jurisdiction from committing illegal acts.

Similarly, it is clear that in this case Illinois has a legitimate and substantial interest in applying its law. Illinois has a right to compel persons within its territorial jurisdiction to adhere to appropriate standards of conduct and to provide remedies which will effectively deprive

those who fail to conform to those standards of conduct of any profits derived from the noncompliance. Illinois has an interest in protecting law-abiding Illinois businesses from having their good will impaired by the circulation of phony products emanating from Illinois. The precise nature of the harmful objects transmitted from Illinois into other states – bullets, fraudulent prospectuses, or cans of colored water labelled "orange juice" – does not affect the right of Illinois to stop such conduct.

IV.
FLUID RECOVERY IS NOT A CRIMINAL SANCTION.

Petitioners' argument that "the use of fluid recovery impermissibly transforms this civil action into a criminal proceeding by imposing what amounts to criminal sanctions upon Petitioner without providing corresponding criminal procedural safeguards" (p. 13) is frivolous. The use of civil proceedings, with a civil burden of proof, to deprive a defendant of the fruits of unlawful activities or to impose "civil penalties" has been consistently upheld by this Court. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984) (forfeiture of property in civil proceeding); *United States v. Ward*, 448 U.S. 242 (1980) (civil penalties); *Tull v. United States*, 481 U.S. 412 (1987) (civil penalties).

"[M]ost if not all states . . . ha[ve] long recognized the fundamental equitable principle that no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." *Simon & Shuster v. Crime Victims Board*, 116 L.Ed.2d 476, 489 (1991). In all states, disgorgement of ill-gotten gains is a remedy commonly imposed on errant fidu-

ciaries. *Restatement 2d, Trusts,* §205 and 206 comment j. On the federal level, it is imposed on persons who infringe copyrights and patents. 17 U.S.C. §504; 35 U.S.C. §284; *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448 (1932).

The use of civil proceedings to effectuate this remedy was noted in *Simon & Shuster* without objection (116 L.Ed.2d at 491). The problem with the New York "Son of Sam" statute was that it violated the First Amendment by discriminating against speech on the basis of content, not that it permitted a non-criminal proceeding to secure disgorgement of the fruits of illegal conduct. And the fact that depriving a defendant of the profits of unlawful conduct has the effect of deterring such conduct does not make the remedy "criminal" any more than punitive damages are "criminal." *Browning Ferris Industries v. Kelco Disposal,* 492 U.S. 257 (1989).

Petitioners' reliance on *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963), is misplaced. *Kennedy* involved a statute which purported to automatically, without any legal proceedings whatever, strip certain draft evaders of their United States citizenship, allowing them to be summarily deported or excluded from the United States. After reviewing the legislative history of the statute and the historic use of exile as a sanction, a divided Court concluded that it imposed a uniquely criminal punishment. The Court noted that exile and imprisonment are referred to in the same sentence of the Magna Carta, along with outlawry (372 U.S. at 186); it is only because exile is such an unusual sanction for illegal behavior in modern times that the question seems to have arisen.[3]

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[3]Indeed, Justice Brennan's concurrence suggested that exile as a sanction for criminal behavior violated the cruel and unusual punishment clause. (372 U.S. at 188)

CONCLUSION

Stripped of its rhetoric and misstatements, the Petition for Certiorari raises nothing of constitutional concern. The entry of a judgment in a civil action under the Illinois Consumer Fraud and Deceptive Business Practices Act in the amount of the ill-gotten gains secured by a perpetrator of consumer fraud and the distribution of the ill-gotten gains to consumers is constitutionally unobjectionable. The Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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